

MINUTES
BOARD OF ENVIRONMENTAL REVIEW
FRIDAY – MARCH 29, 2002

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:06 a.m., on Friday, March 29, 2002, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Joe Russell, Chairman, Susan Kirby Brooke, David Fishbaugh, Garon Smith, Ward Shanahan, and Russ Hudson via. teleconference

Board Members Absent: Kim Lacey

Board Attorneys Present: Tom Bowe and Kelly O'Sullivan, Attorney Generals Office, Department of Justice

Court Reporter Present: Cheryl Romsa, Cheryl Romsa Court Reporting, for Lesofski & Walstad Court Reporting

DEQ Personnel Present: Jan Sensibaugh, Director; Curt Chisholm, Deputy Director; John North, Chief Legal Council, Legal Unit, Director's Office (DIR); Claudia Massman, Legal Council, Legal Unit, DIR; John Arrigo, Administrator, Enforcement Division (ED); Don Vidrine, Bureau Chief, Air and Waste Management (AWMB), Permitting and Compliance Division (PCD); Art Compton, Administrator, Planning, Prevention and Assistance Division (PPAD); Bonnie Lovelace, Bureau Chief, Water Protection Bureau (WPB), PCD; Dave Klemp, Air Quality Permitting Program Manager, AWMB, PCD; Charles Homer, Technical Support Manager, AWMB, PCD; Abe Horpestad, Resource Protection Bureau (RPB), PPAD; Mike Suplee, RPB, PPAD; Jan Brown, AWMB, PCD; Jim Madden, Legal Council, Legal Unit, DIR; Lisa Peterson, Public Affairs Coordinator, DIR; Norm Mullen, Legal Council, Legal Unit, DIR; Eric Regensburger, WPB, PCD; Jeff Blend, RPB, PPAD; Christian Levine, RPD, PPAD.

Interested Persons Present: Jon Metropoulos [sic], Fidelity E&P; Greg Petruska, Fidelity E&P; Harmon Ranney, MCBNGA; Art Hayes, Jr., Tongue River Water Users; Roger Muggli, Tongue & Yellowstone Irrigation (TYI); Rex Mongold [sic], Tongue River Farm; Charles Gephart, TYI; Joe Icenoggle, Fidelity E&P; Gene Onacko, Jr., BIA; Steve Wade, Town of Geraldine; Don Quander, Holland & Hart; Marc Evans, SWMBIA; Bill Simkins, Simkins-Hallin [sic] Lumber; Jeff Barber [sic], MEIC; Anne Hedges, MEIC; Steve Wright, CFAC; Dan Rapkoch, CES; Terry Webster, CES; Don Allen, WETA; Steve Gilbert, NPRC; M.S. Kakuk, MCA, WETA, Marathon [sic] Oil; Bill Schafer, Schafer LTD, Montana CBNG Alliance; Mike Murphy, MT Water Resources Assn.; Dexter Busby, Montana Refining Co.; Stu Levit, AWL; John Blomquist, MT Stockgrowers Assn. [sic]; John Youngberg, MT Farm Bureau; Steve White, Bozeman resident; Julie DalSoglio [sic], EPA; Ron Steg, EPA; Brenda Lindlief Hall, Tongue River Water Users; Steve Pilcher, MT Stockgrowers

I. Administrative Items

A. Review and Approve Minutes of January 25, 2002, Meeting.

Mr. Smith identified an error on page 10, paragraph 8, the last line should read "decision to accept or reject an initial review", instead of "on initial review."

Mr. Hudson identified an error on page 3, second to the last paragraph, the end of the sentence, "...trying to offset what is being forced upon the public by other people", should read "...trying to offset these costs that come about by the implementation of other regulatory programs, of which we don't know the cost at implementation, and is one of the reasons we now take higher permit fees."

Chairman Russell called for approval of the minutes with changes noted. Mr. Smith MOVED to APPROVE the January 25, 2002, meeting minutes. Mr. Shanahan SECONDED the motion. The motion CARRIED unanimously.

II. Briefing Items

A. Contested Case Update

1. Cases Assigned to Hearing Officer Kelly O'Sullivan

a. Town of Geraldine

Ms. O'Sullivan updated the Board, stating the case had become rather complex. Since DEQ had reclassified streams in the state, the Town's lagoon wastewater treatment system is now considered a state water, requiring a MPDES permit, which would require the Town to substantially upgrade their facilities and would cost a lot of money. Ms. O'Sullivan identified two areas they are working on, one having to do with a technical fix and the other having to do with rules reclassifying streams. The Town has asked for an indefinite continuance of the hearing and will keep Ms. Sullivan apprised of where they are with the matter.

Steve Wade, Town of Geraldine, clarified that the Town has already spent a lot of money and that the change in the permit would result in additional expenditures of money the Town does not have. Mr. Wade further stated that working with the DEQ through rules and potentially a technical fix would better serve the Town.

A discussion was held regarding the current classification of the stream and whether the DEQ was comfortable with continuing the process until the previous matters were resolved, which also included a discussion on the laws involved.

Mr. Smith MOVED to SUPPORT Ms. O'Sullivan's suggestion to continue the case. Mr. Smith added that the case should be reviewed before December 31, 2002. Mr. Shanahan SECONDED the motion. The motion CARRIED unanimously.

b. Conoco

Ms. O'Sullivan informed the Board that a settlement had been reached, and that the finalized settlement agreement should be ready for the Board at the next meeting.

c. Blaine County

Ms. O'Sullivan informed the Board that the case is proceeding. She further informed the Board that discovery had closed, and the dates for both the prehearing conference and the hearing are scheduled.

2. Cases Assigned to Hearing Officer Tom Bowe

a. M&W Investments, Inc.

Mr. Bowe stated he didn't have much to add to the way the item was listed in the agenda. The case is on schedule.

b. Louisiana-Pacific Corporation

Mr. Bowe stated that this is the contested case that the Board decided to hold the hearing itself, and that we are on schedule to hold the hearing at the next meeting. He further suggested that the Board schedule the hearing to start on June 6. Chairman Russell noted it as a "heads-up", pending the outcome of the remaining agenda.

3. Cases in Litigation

a. United Harvest

Mr. Bowe updated the Board on this case, stating that a decision had not been issued and that a decision in the case might address some recurring issues that had come up in contested cases.

(A short discussion was held in regard to the possibly large number of items for the June agenda, and whether to set it as a two-day meeting. Chairman Russell stated that we still did not know what was going to happen today.)

III. Action Items

A. Initiation of Rulemaking and Appointment of Hearing Officer

1. Adopt New Rules I Through IX (Water Use Classifications) and New Rule X (Numeric Water Quality Standards)

Chairman Russell introduced this agenda item.

Christian Levine explained the difference between the two proposals and the reason they were put together as one.

Mr. Levine presented testimony to the Board on behalf of the DEQ regarding New Rules I through IX. He explained various steps that would be involved once the Rules were adopted. He further explained how waters in the state are classified currently, and how the current classification system does not handle certain types of waters very well. Mr. Levine went on to explain the costs associated with discharge treatment. He then gave a summary of the different classes being proposed, including the process for reclassification. A brief discussion was held regarding application in the field.

Mike Suplee presented testimony to the Board on behalf of the DEQ, regarding New Rule X. His discussion included overheads. Mr. Suplee discussed the algae problems on areas of the Clark Fork River, and the causes of the excess algae. He discussed the 1998 Clark Fork Voluntary Nutrient Reduction Program. Mr. Suplee spoke of the specific areas the standard would apply to and the reasons for it.

Discussion was held on the different types of filter, enforcement of the standards, and the TMDL process. Clarification was made that the Clark Fork River was the only river involved, and only a specific portion of it. The specific TMDL's being looked at were also discussed.

Mr. Smith MOVED to INITIATE rulemaking. Mr. Bowe was APPOINTED as hearings officer. An AMENDMENT was made and applied to the definition on page 8 of the notice, definitions 32 and 33: "unfiltered" means not having been filtered through a .45 micron filter. Mr. Hudson SECONDED the motion. The motion CARRIED unanimously.

2. Amend Air Quality Rules on Air Pollution Control Equipment Maintenance Rule (Columbia Falls Aluminum Company [CFAC])

Charles Homer, representing the DEQ, requested the Board consider adoption of this rule, which currently would only affect CFAC. Mr. Homer offered a brief background of the CFAC facility and processes. He spoke on the background of a previous variance request made by CFAC to the Board. Mr. Homer explained the implications of the rule and the rule's intention.

Discussion was held on the State Implementation Plan (SIP) and the fact that the Board has no jurisdiction over it. Further discussion was held on the timing of the maintenance event.

Mr. Shanahan MOVED to APPROVE the proposal for amendment and that Mr. Bowe be APPOINTED as hearings officer. Mr. Bowe set May 23, at 10:30 a.m. as the hearing date. Ms. Brooke SECONDED the motion. The motion CARRIED unanimously.

3. Amend Air Quality Rules on Change in Definition of "Major Source" for the Title V Permitting Program

Mr. Homer presented testimony to the Board on behalf of the DEQ. Mr. Homer explained the definitions under previous and current rules. He stated that the DEQ is proposing to adopt the federal rule, verbatim.

Mr. Fishbaugh MOVED to initiate the process and to APPOINT Mr. Bowe as hearings officer. Mr. Bowe expected to conduct the hearing May 30. Mr. Shanahan SECONDED the motion. The motion CARRIED unanimously.

(Break 10:15-10:30)

B. New Contested Case Appeals

1. Sterling Mining Company – Rock Creek

Chairman Russell introduced the item, giving a brief background. Mr. Bowe stated changes in the dates listed on the agenda for discovery and depositions. He also reported that the mining company had not intervened in the contested case proceeding.

Mr. Shanahan MOVED that Mr. Bowe continue as hearing examiner in this case. Ms. Brooke SECONDED the motion. Mr. Shanahan led discussion on a possible conflict of interest with him and noted he reserves the right to recuse himself from a decision on the matter.

Alan Jocelyn, representing Sterling, spoke on behalf of Sterling regarding their decision to not intervene. Chairman Russell expressed concerns of the company intervening late in the process.

Chairman Russell reiterated the motion was on the floor and had been seconded. The motion CARRIED unanimously.

C. Other Action Items

1. Outstanding Resource Water Petition

Chairman Russell introduced the item and discussion was held regarding the exact length, in miles, of the portion of the Gallatin River being affected.

Chairman Russell pointed out that this item had been tabled at the last meeting. Discussion was held regarding whether the item needed to be removed from the table, and so it was decided.

Ms. Brooke MOVED to have the item removed from the table. Mr. Shanahan SECONDED the motion. The motion CARRIED unanimously.

Art Compton, representing DEQ, addressed the Board and gave a brief history of the issues from the last Board meeting regarding this matter. Mr. Compton explained the difference between sufficient credible evidence and the standard of proof, as well as the differences in outcome between the Board accepting or rejecting the petition.

Mr. Compton went into his presentation and explained the practical effects of ORW designation on some specific sources, in answer to a question from the Board at the previous meeting. Mr. Compton gave details regarding Big Sky Water and Sewer District's existing permit and their methods of discharge. He went into further discussion regarding new point sources on the Gallatin and the tributaries and the subject of degradation. Mr. Compton then went into detail for non-point sources, both on the Gallatin and tributaries.

Mr. Compton then introduced Eric Regensburger to answer a host of questions about specific permit issues the Board presented at the last meeting. A question and response sheet was handed out to the Board.

Mr. Regensburger read the first question pertaining to nondegradation review for surface water impacts of a proposed septic system near the Gallatin. He then gave a positive response, adding that there has been a surface water nonsignificant determination made for a system on the Gallatin: Ramshore View Estates. Mr. Regensburger offered details of that system and spoke of three additional, separate subdivisions that have also been required to demonstrate compliance.

An in-depth discussion was commenced about the current systems and the application to degrade analysis. This discussion led to questions concerning other scenarios and the possible determinations and effects. Further discussion was held on groundwater discharges. Through this discussion, questions one through three were answered.

Mr. Regensburger introduced the fourth question, which was in regard to the need for more information than just the factors considered, such as distance of the septic field from the river, volume of discharge expected, and volume of discharge that would raise concerns about hydrological connection. In response, he explained that the current methods used for nonsignificance determination would not change with ORW designation. Mr. Regensburger also clarified that there is no set distance and no set volume.

The next question was in regard to the subsurface geology. Mr. Regensburger explained the varying surficial geology along the Gallatin and how each would affect engineering a drain field.

The final question concerned the area of set-back for private systems and how ORW designation would affect those set-back requirements. Mr. Regensburger explained the requirements and clarified that ORW designation would not affect those requirements.

Mr. Shanahan and Mr. Regensburger engaged discussion on the interpretation aspects of both the numeric and the narrative standards.

Mr. Compton spoke regarding the need for an Environmental Impact Statement (EIS) or an Environmental Assessment (EA), and both the costs and the time associated with those.

Ms. Brooke MOVED to ACCEPT the petition. Mr. Shanahan SECONDED the motion.

Stu Levitt, proponent representing American Wildlands, addressed the Board and requested that, if public comment is needed, a public hearing be held in the Bozeman, Big Sky, or Gallatin Gateway area. He went on to discuss questions that have come up, and further quoted part of a letter from John Vincent, Gallatin County Commissioner. Mr. Levitt spoke in support of a formal evaluation under the Montana Environmental Policy Act and requested that the Board move the petition forward.

Steve White, Bozeman resident, spoke in opposition of the petition. Mr. White referenced statute 75-5-316(3)(c)(i), and the six areas that the petition has to satisfy to gain classification as an ORW, according to the statute. Mr. White referenced his written testimony, which details why he believes that only one qualifies.

Don Allen, representing the Western Environmental Trade Association (WETA), spoke in opposition of the petition. Mr. Allen expressed confusion over the actual length, in miles. Mr. Allen further explained his disagreement with the Department's conclusion that all three necessary categories have been met. He went on to discuss concerns of appeals on Department decisions and expressed hopes that the Board does not feel like it has to make a fast decision. Mr. Allen also said he felt an EIS was necessary, as opposed to an EA, and went on to quote part of the Montana Constitution.

John Youngberg, Chairman of the Statewide TMDL Advisory Group, spoke for himself in opposition of the petition. Mr. Youngberg spoke of the court-ordered timeframe for completion of the TMDL program in reference to their current status. He also advised that most likely an EIS would be needed and that the Planning, Prevention and Assistance Division was currently short-handed.

Chairman Russell clarified, with Mr. Youngberg, the fact that Mr. Youngberg gave testimony as Chairman of his advisory group, not for the group. Further discussion was held regarding the resources that would be used for an EIS in relation to the TMDL budget.

Steve Pilcher, Executive Vice President, Montana Stockgrowers Association, spoke in opposition of the petition. He offered his opinion of the downside of the petition and spoke on the various tests that must be met. Mr. Pilcher argued in favor of other processes.

Bill Simkins, Bozeman resident, submitted written testimony in opposition of the petition. Mr. Simkins implicated that there has not been a showing that a problem exists, neither has there been a showing that there are no other reasonable means to protect the river. He further indicated an EIS should be required if the petition is accepted.

Mark Evans, Bozeman resident and Executive Director of the Southwest Montana Building Industry Association, offered written and verbal testimony in opposition of the petition. Mr. Evans spoke on the issue of both support and nonsupport of the petition and on lack of citation to credible data. He further spoke in support of an EIS, as opposed to an EA, and the waste he felt it would be to incur the staff time and dollars for an EIS when the chances of ORW designation being approved by the legislature is slim to none. Mr. Evans gave further discussion concerning the impact to current businesses and some of their future prospects of expanding.

Chairman Russell and Mr. North entered into discussion concerning an EIS versus an EA, and possible timeframes required for both.

Lengthy discussion was held in regard to the number of people who signed the petition in Gallatin County and from whom support was sought and not sought. The funding of the EIS was also discussed. Ms. Sensibaugh clarified that there is currently no funds appropriated for an EIS. Mr. North explained that only financial impossibility would relieve the agency from its duty to comply with the law.

Mr. Shanahan MOVED to AMEND the PRINCIPLE MOTION and accept the petition with the condition that an EIS be done and that the final ruling be done after the Board has reviewed the results of the EIS. Ms. Brooke CONCURRED. Further clarifying discussion was held on the criteria that needed to be met. The motion CARRIED 4-2.

2. Potential Development of Numeric Standards for Electrical Conductivity (Salinity or EC) and Sodium Absorption Ratio (SAR)

Mr. Compton, representing the DEQ, introduced the item, giving a general overview of Coal Bed Methane (CBM) and the purpose of the briefing at this meeting. He offered explanations of the two parameters of concern, EC and SAR.

Dr. Abe Horpestad, representing the DEQ, presented oral testimony while giving an overhead presentation. He provided explanation of various water quality standards and why there are a variety of such. He explained that EC and SAR are higher in CBM water than in natural waters, and further said that, if adopted, the standards would be site-specific.

Dr. Horpestad discussed measures of EC and plant thresholds. He went on to discuss leaching fractions, including definition and effects on a variety of soils and plants, methods of irrigation, and results of research performed concerning leaching fraction.

Dr. Horpestad defined SAR and compared existing SARs. He then explained the effects in relation to EC and the different types of soils. He spoke on classifications and standards, and gave comparative discussion on narrative and numeric standards. Dr. Horpestad gave in-depth testimony on the reasons for needing numeric standards for SAR and EC. He also explained assimilative capacity. Dr. Horpestad pointed out that guidance was being sought from the Board as to which crops need protecting and at what level.

Harmon Ranney presented testimony on behalf of the Montana Coalbed Natural Gas Alliance (Alliance). His discussion began with a statement that numeric standards could have significant impacts on development of Montana's natural gas. Mr. Ranney then introduced the Alliance's technical person, Dr. Bill Schafer.

Dr. Schafer provided a slide presentation and gave details of how coalbed methane water develops, emphasizing that it's a natural process. He also said he agreed with Dr. Horpestad on many of the issues Dr. Horpestad addressed. Dr. Schafer discussed leaching fractions and further stated he disagreed with Dr. Horpestad's assessment of average leaching fractions in Montana. Dr. Schafer talked about SAR in relation to soils and discussed salinity guides issued in the early to mid 80's. He then compared the ambient water quality with the SAR and EC standards, and gave specifics for various rivers.

Chairman Russell reminded those who wished to address the Board on this matter, to keep to the EC, SAR, and numeric versus narrative standards, and that this was not the time or the place to argue coalbed methane development in Montana.

Art Hayes, Jr., representing President of the Tongue River Water Users Association, presented testimony in support of numeric standards. Mr. Hayes distributed a report of a study performed by Dr. Larry Munn. Dr. Munn had analyzed soil data and soil test results collected from farmers and ranchers, and made specific numeric standard recommendations. Mr. Hayes went on to discuss leaching fractions. He then gave a brief discussion on CBM water use and the effects. In close, Mr. Hayes presented a petition signed by farmers, ranchers and other concerned people who strongly support numeric standards, and further requested the hearing for setting the standards be held in Miles City.

Discussion was held comparing issues in Wyoming versus Montana, to include number of wells, effects coming out of Wyoming, and what Wyoming is doing to reduce the amount of problems coming from CBM in Wyoming. It was confirmed that Wyoming has narrative standards. Further discussion was held concerning an agreement between the Wyoming DEQ and Montana DEQ on border water quality. The period of the agreement was for 18 months from August 2001. Also discussed was the Montana-Idaho border agreement, the differences between that agreement and the agreement with Wyoming, and the reasons for the difference.

Joe Icenogle, Public Affairs Coordinator for Fidelity Exploration and Production Company (Fidelity), informed the Board that he would submit the company's water quality monitoring reports at a later time. Those reports were done above and below the company's discharges.

Roger Muggli, Tongue and Yellowstone Irrigation District operator, stated that the district supports numeric standards. Mr. Muggli named other entities that also supported the numeric standards, and supplied letters from those entities. He supplied a tape from Northern Plains on the Doing-It-Right Program. Mr. Muggli passed around some field photos showing large white spots in the soil. He brought up concerns some people had concerning their vineyards in Miles City, irrigated with Tongue and Yellowstone River (T&Y) water. Mr. Muggli concluded his presentation with a statement to the Board that a numeric standard is needed and for the Board to give that some real consideration.

Rex Mongold, farm owner south of Miles City, addressed the Board. His farm is irrigated out of the T&Y ditch. Mr. Mongold offered a brief summary of his farming background and how he ended up in Miles City. He provided discussion on water quality, both high quality and degraded, and the effects of degraded water quality on high-value crops. Mr. Mongold concluded with a request that the Board hold their next meeting, or a hearing, in Miles City and meet the people.

Steve Gilbert, representing Northern Plains Resource Council, addressed the Board and provided photographs of effects of high SAR CBM discharges and effects of leaching fractions on soils and hay crops. Mr. Gilbert concluded with a statement in support of DEQ's procedure to establish rules for numeric standards.

Jeff Barber provided testimony on behalf of Montana Environmental Information Center (MEIC). Mr. Barber stated he felt it was important for the Board to look at numeric standards, so that everyone knows when they're exceeding. He also stated that MEIC thinks there is a conflict-of-interest issue in this case, as was brought up by Mr. Shanahan in regard to the Sterling Mining case, and that they (MEIC) will continue to raise the issue.

Charlie Gephart, soil scientist working with Mr. Muggli, provided discussion on the effects of sodium on soil of a coal-based series. He went into detail about specific zones of the soil and high pH levels that indicate sodium. He stated that any irrigation water carrying any salts would start to degrade the soil quickly. Mr. Gephart discussed another level of soil, containing gypsum, and the effects of sodium on those soils, including soil collapse. He further stated that once you get to that point (soil collapse), there's nothing you can do with that soil.

Jon Metropoulos, speaking on behalf of Fidelity, stated concerns that this briefing had turned into a debate. He further requested that the Board not make any substantive decisions on this matter, this day.

Mr. Compton provided a brief wrap-up, on behalf of DEQ, with three questions of the Board: 1) What crops should they aim to protect? 2) What level of yield protection should they aim for? 3) How would the Board like to see DEQ allocate the assimilative capacity between Wyoming, Montana, and the Tribes?

Mr. Smith offered an immediate response to question two, reiterating earlier comments by stating that anything less than a 100 percent yield represented a takings from the landowners.

Mr. Hudson requested that Mr. Compton address and explore any federal or state rules regarding interstate compacts related to this issue, and report back to the Board. Mr. Compton agreed to do that.

Chairman Russell spoke in opposition of the Board making any decisions or answering any of the questions asked by DEQ, at this point. He stated he did not feel enough information had been provided. He further suggested DEQ put together a rule, based on what they believe the science is, and give the Board something to look at.

Mr. Compton asked the Board for thoughts regarding the crops to be protected. Ms. Brooke reiterated that it's a takings if the crops are not protected. Discussion commenced regarding potential crops, and it was suggested that DEQ determine what is going on with those. Mr. Compton stated they anticipate being back before the Board in June with a proposal.

3. Request for Board Review and Approval of a Policy Regarding Submittal of Documents to the Board.

Mr. Chisholm provided details of this item, stating it is a Policy, therefore would not be enforceable unilaterally. The policy would be a suggestion from the Board, that any party

wishing to submit documents to the Board, pertaining to an agenda item, should submit both a hard copy and an electronic version of the document. Mr. Chisholm further stated the reason for this policy was to assist in making information available to the public, by posting the electronic version on the BER Website.

Mr. Hudson MOVED to ACCEPT the policy and put it in motion. Mr. Fishbaugh SECONDED the motion. The motion CARRIED unanimously.

Mr. Chisholm requested direction from the Board on the next meeting (June). He offered details of what was expected on the agenda for that meeting. Mr. Chisholm further suggested a two-day meeting.

Chairman Russell suggested starting at 1:00 p.m. on Thursday June 6, with the LP hearing, then having the regular agenda start at 8:00 a.m. on Friday, June 7. He further stated he hoped the first thing on the agenda for June 7 would be the numeric water quality standards.

Mr. Shanahan MOVED to ADJOURN. Ms. Brooke SECONDED the motion. The meeting adjourned at 4:16 p.m.

Board of Environmental Review March 29, 2002, Minutes Approved:

JAN P. SENSIBAUGH, DIRECTOR
DEPARTMENT OF ENVIRONMENTAL
QUALITY

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL
REVIEW

DATE

DATE